Filed 2/26/19 P. v. Benoit CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>OLIVIA BENOIT,<br><br>Defendant and Appellant. | B282423<br><br>Los Angeles County<br>Super. Ct. No. TA141467 |

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Judge. Affirmed in part, sentence vacated, and remanded with directions.

Emily Lowther Brough, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Olivia Benoit was convicted of robbery after stealing two packages of hair extensions and a can of mousse from a beauty supply store. She contends that there is no substantial evidence to support the force/fear element of robbery, that the court erroneously admitted evidence of her two prior misdemeanor theft convictions, that counsel provided ineffective assistance by failing to request a limiting instruction, and that we should vacate her sentence and remand for the court to exercise its new sentencing discretion under Senate Bill No. 1393. We agree that defendant is entitled to the benefit of the change in the law. As such, we vacate her sentence and remand for further proceedings. In all other respects, we affirm.

## PROCEDURAL BACKGROUND

By information dated February 1, 2017, defendant was charged with one count of second degree robbery (Pen. Code,[1] § 212.5, subd. (c)). The information also alleged that she had been convicted of one prior felony (a 2007 robbery) that constituted both a strike prior (§ 667, subds. (b)–(j); § 1170.12) and a serious-felony prior (§ 667, subd. (a)). Defendant pled not guilty and denied the allegations.

After a bifurcated trial at which she did not testify, the jury found defendant guilty of robbery. While the jury deliberated, defendant waived her right to a jury trial on the prior-conviction allegation. The court later found the allegation true.

The court granted defendant's motion to strike her prior conviction under *People v. Superior Court* (*Romero*) (1996) 13

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[1] All undesignated statutory references are to the Penal Code.

Cal.4th 497, and sentenced her to an aggregate term of seven years in prison—the low term of two years for the robbery (§ 212.5, subd. (c)) plus five years for the serious-felony prior (§ 667, subd. (a)), to run consecutively.

Defendant filed a timely notice of appeal.

## FACTUAL BACKGROUND

### 1. Prosecution Evidence

The afternoon of October 6, 2016, Kee Tae Kim and his wife were working at their beauty supply store in Los Angeles. Kim was dozing in the back of the store while his wife operated the cash register at the front.

Around 4:00 p.m., Kim woke up and saw defendant walking towards him holding a can of mousse. Defendant then picked up two packages of hair extensions and headed to the storage area in the back of the store. Kim followed her and saw her pick up a box cutter. Kim used the box cutter to break down boxes and typically left it folded in the storage area.

Kim told defendant to come out of the storage room. She screamed, and Kim told his wife to call the police. As defendant emerged from the storage room holding the closed box cutter, Kim tried to grab it from her. Kim was scared because he had once been shot. Defendant pulled away from Kim and walked down another aisle towards the cash register near the entrance.

Kim thought defendant was trying to leave without paying for the merchandise, so he headed to the front door to block her exit. Defendant screamed. Kim hit defendant's arm or the merchandise she was holding in an attempt to take the box cutter

from her.[2] Defendant resisted, and a struggle ensued. The mousse, hair extensions, and box cutter fell to the ground. Defendant began screaming loudly and hysterically, "Give me back my merchandise."

Sometime during this altercation, defendant scratched Kim's arm. Kim acknowledged that at the preliminary hearing, he had testified that defendant didn't make any contact with him, but he explained that he meant defendant never tried to stab him or hurt him—she was only being defensive after he hit the items out of her hands.

Police arrived during the struggle. As Los Angeles Police Department Officer Sonia Dibell approached the store, she saw Kim struggling with someone; both people appeared to be "tugging at something" in a "back and forth motion." Dibell and her partner entered the store, handcuffed defendant, and escorted her to the back of a police car. Defendant was screaming and crying uncontrollably. She told Dibell, "I saw a knife that looked like my son Husky, so I grabbed it."

Defendant was carrying $94.94 at the time of her arrest. The mousse and hair extensions cost a total of about $25.

**2. Defense Evidence**

Forensic psychologist Dr. Ann Walker performed a clinical evaluation of defendant after her arrest. Defendant told Walker about her upbringing, background, and history of trauma.

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[2] Kim testified at the preliminary hearing that he could not tell whether the box cutter was open or closed at this point; at trial, he testified that the box cutter blade was either out or that defendant was simply holding it.

Walker diagnosed defendant with schizophrenia, major depressive disorder, and post-traumatic stress disorder. Walker explained that when a person with extreme PTSD and schizophrenia is struck or grabbed unexpectedly, the person will "often just kind of go berserk" because "they are … not in this world." The person may scream and hit to protect herself from perceived dangers. After watching surveillance video of defendant, Walker opined that her behavior was consistent with that of a person suffering from PTSD and schizoaffective disorder.

## DISCUSSION

Defendant contends that there is no substantial evidence to support the force/fear element of robbery, that the court erroneously admitted evidence of her two prior misdemeanor theft convictions, that counsel provided ineffective assistance by failing to request a limiting instruction, and that we should vacate her sentence and remand for the court to exercise its new sentencing discretion under Senate Bill No. 1393.

### 1. Sufficiency of the Evidence of Force or Fear

A criminal defendant may not be convicted of any crime unless the prosecution proves every fact necessary for conviction beyond a reasonable doubt. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Tenner* (1993) 6 Cal.4th 559, 566.) "This cardinal principle of criminal jurisprudence" (*Tenner*, at p. 566) is so fundamental to the American system of justice that criminal defendants are always "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts."

(*United States v. Powell* (1984) 469 U.S. 57, 67.) Defendant contends there is insufficient evidence of force or fear to support her conviction for second degree robbery. We conclude that the evidence here is legally sufficient.

### 1.1. Standard of Review

In assessing the sufficiency of the evidence to support a conviction, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Deference is not abdication, however, and substantial evidence is not synonymous with *any* evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–577.) " 'A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' [Citation.] Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence." (*In re James R.* (2009) 176 Cal.App.4th 129, 135.) Similarly, we "may not … ' "go beyond inference and into the realm of speculation in order to find support for a judgment." ' " (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947; *People v. Waidla* (2000) 22 Cal.4th 690, 735 [speculation is not evidence and cannot support a conviction].)

Evidence that merely raises a strong suspicion of guilt is insufficient to support a conviction. (*People v. Thompson* (1980) 27 Cal.3d 303, 324.)

### 1.2. Elements of Robbery

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Thus, to convict a defendant of robbery, the prosecution must prove:

- The defendant took property that was not her own;
- The property was in the possession of another person;
- Defendant took the property from the other person or his immediate presence;
- The defendant took the property against that person's will;
- The defendant used force or fear to take the property or to prevent the other person from resisting; and
- When the defendant used force or fear to take the property, she intended to deprive the owner of it permanently.

(§ 211; see CALCRIM No. 1600.) Essentially, "[r]obbery is larceny with the aggravating circumstances that 'the property is taken from the person or presence of another' and 'is accomplished by the use of force or by putting the victim in fear of injury.' (*People v. Gomez* (2008) 43 Cal.4th 249, 254, fn. 2.)" (*People v. Anderson* (2011) 51 Cal.4th 989, 994.)

In California, " 'robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.' (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.)" (*People v. Anderson*, *supra*, 51 Cal.4th at p. 994.) Thus, a defendant who does not use force or fear when she first takes the property may nonetheless be guilty of robbery if she uses force or fear to keep it or carry it away in the victim's presence. (*People v. Gomez*, *supra*, 43 Cal.4th at pp. 256, 264.)

### 1.3. There is substantial evidence that defendant used force while carrying the property away.

Defendant contends there is no substantial evidence to support the jury's conclusion that she used force or fear to obtain or attempt to keep the hair extensions and mousse. After reviewing the transcript and videos in this case, we agree that there is no substantial evidence defendant used force or fear when she exited the storage room.[3] We conclude, however, that there *is* substantial evidence she forcibly resisted Kim's attempt to regain his property at the store entrance.

Based on the video, the jurors could conclude that defendant used some level of force not just to protect herself but *also* to escape with the hair extensions and mousse. As defendant approached the front of the store, Kim tried to take the merchandise from her hands. Defendant then swung her body around and hugged the items to her chest as Kim continued to grab at his property. With her back to Kim, defendant successfully held on to the items for a few seconds before they fell

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[3] The People's assertion that defendant lunged at Kim when she came out of the storage room is supported neither by the transcript pages they cite nor by the video evidence.

to the floor. This was sufficient. (*People v. Pham* (1993) 15 Cal.App.4th 61, 68 ["It is enough that defendant forcibly prevented the victims from recovering their property, even for a short time"].) Nor is Kim's initiation of contact dispositive: He was allowed to try to get his merchandise back. (*People v. Gomez*, *supra*, 43 Cal.4th at p. 264 ["It is the conduct of the perpetrator who resorts to violence to further his theft, and not the decision of the victim to confront the perpetrator, that should be analyzed in considering whether a robbery has occurred."].)

In short, while the evidence supporting the force element was close, it was nevertheless sufficient—and as long as evidence is legally sufficient, it is the trier of fact, not this court, that must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Harris* (2013) 57 Cal.4th 804, 849–850; *People v. Friend* (2009) 47 Cal.4th 1, 41 [we may resolve neither credibility issues nor evidentiary conflicts].)

**2. Evidence of Misdemeanor Theft Convictions**

Defendant contends the court abused its discretion by allowing the prosecutor to question Walker about defendant's two prior misdemeanor theft convictions. We conclude defendant has not established that any error was prejudicial.[4]

**2.1. Legal Principles**

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of

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[4] Defendant does not challenge the prosecutor's questions about her two felony theft convictions.

consequence to the determination of the action." (Evid. Code, § 210.) The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

We review a court's evidentiary rulings for abuse of discretion, and we will not disturb the court's choices unless it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

**2.2. Proceedings Below**

Before Walker, the defense psychiatric expert, took the stand, the court held a hearing to discuss the parameters of her testimony. Over defense objection, the court granted the prosecution's request to cross-examine Walker about whether defendant's prior theft convictions—two misdemeanors and two felonies—affected her opinion about whether defendant had the necessary mental state for robbery.[5]

The court decided to sanitize the convictions, however, and directed the parties to refer to them in front of the jury as "two felony theft-related convictions and two misdemeanor convictions." The parties could privately tell Walker about the nature of the convictions in case it mattered to her opinion.

During direct examination, defense counsel asked Walker if she had "been made aware of the fact that Ms. Benoit has two

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[5] The felony convictions were for robbery (2007) and receiving stolen property (2009). The misdemeanors were both for petty theft (2015 and 2016).

convictions, two felony convictions for theft-related offenses and two misdemeanor convictions for theft-related offenses." Walker said she knew about the convictions.

On cross-examination, the prosecutor asked if defendant's two theft-related felony convictions and two theft-related misdemeanor convictions affected Walker's opinion. She replied that they did not alter her diagnosis or conclusions.

### 2.3. Defendant has not established that any error was prejudicial.

Even assuming the questions about the misdemeanor convictions were both minimally relevant and substantially more prejudicial than probative, we may not reverse unless defendant can establish prejudice—that is, that it is reasonably probable she would have achieved a more favorable verdict absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836–837.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, citing *Watson*, at p. 837.) An error is prejudicial whenever the defendant can " 'undermine confidence' " in the result achieved at trial. (*College Hospital Inc.*, at p. 715.) "In assessing prejudice, we consider both the magnitude of the error and the closeness of the case." (*People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1041.)

Here, defendant does not explain why or how the asserted error prejudiced her.[6] Accordingly, she has not carried her burden on appeal.

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[6] Defendant briefly addresses the issue in her reply brief, noting that "[g]iven the lack of substantial evidence of the crime of robbery, it is

### 3. Failure to Request a Limiting Instruction

Defendant argues that her attorney provided constitutionally ineffective assistance by failing to request an instruction limiting the jury's consideration of the misdemeanor thefts.[7] We find no constitutional violation.

#### 3.1. Legal Principles

Under either the federal or state Constitution, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) To establish ineffective assistance of counsel, defendant must satisfy two requirements. (*Id*. at pp. 690–692.)

First, she must show her attorney's conduct was "outside the wide range of professionally competent assistance." (*Strickland*, *supra*, 466 U.S. at p. 690.) Then, she must demonstrate the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel's failings, the result of the proceeding would have been different. (*Id*. at p. 694.) "It is not sufficient to show the alleged errors may have

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apparent that the misdemeanor theft evidence was used" as propensity evidence. As we have discussed, however, there was sufficient evidence to support the robbery conviction.

[7] Defendant does not appear to argue that counsel should have requested such an instruction about the felony priors. Nor does defendant argue that counsel was ineffective for mentioning that the misdemeanors were theft-related notwithstanding the court's order to refer to them only as "misdemeanor convictions."

had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

Claims of ineffectiveness must usually be "raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform" the inquiry. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) "There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." (*Massaro v. United States* (2003) 538 U.S. 500, 508.) But those cases are rare.

Usually, if "the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation. [Citations.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) These arguments should instead be raised on collateral review. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

### 3.2. Counsel had tactical reasons not to request the instruction.

Failure to request a limiting instruction is not necessarily evidence of incompetence. Here, for example, a " 'reasonable attorney may have tactically concluded that the risk of a limiting instruction ... outweighed the questionable benefits such

instruction would provide.' [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053.) The testimony about defendant's prior criminal conduct was exceedingly brief and did not affect Walker's opinion. Moreover, the substance of the prior crimes was revealed only in the lawyers' questions—which the jury was explicitly instructed not to consider as evidence. Under the circumstances, defense counsel may have deemed it unwise to call further attention to defendant's criminal history by requesting an instruction on it. (See *People v. Hinton* (2006) 37 Cal.4th 839, 878; *Hernandez*, at p. 1053.) Here, the decision not to request a limiting instruction "comes within [the] broad range of trial tactics that we may not second-guess. [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) Accordingly, counsel's performance was not deficient.

**4. Resentencing is required.**

In response to our request for supplemental briefing, defendant contends we must remand for the trial court to exercise its newly-acquired sentencing discretion under Senate Bill No. 1393. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.); Stats. 2018, ch. 1013, §§ 1–2.) The People properly concede the point, and we agree.

When defendant was sentenced in this case, the court had no discretion " 'to strike any prior conviction of a serious felony for purposes of enhancement [of a sentence] under Section 667.' " (§ 1385, subd. (b); *People v. Jones* (1993) 12 Cal.App.4th 1106, 1116–1117.) Thus, though the court could (and did) strike defendant's prior strike under *Romero*, *supra*, 13 Cal.4th 497, it imposed a five-year enhancement for the same prior conviction under section 667, subdivision (a).

After briefing was complete in this appeal, the California Legislature passed, and the Governor signed, Senate Bill No. 1393, which went into effect on January 1, 2019. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.); *People v. Camba* (1996) 50 Cal.App.4th 857, 865 [effective date of non-urgency legislation].) The bill amended section 667, subdivision (a), and section 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a serious-felony prior for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Senate Bill No. 1393 is "ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) As such, Senate Bill No. 1393 applies retroactively to all cases, such as this one, that were not final when it took effect. (*Garcia*, at p. 973.)

As the People concede, defendant's sentence must be vacated and the matter remanded to afford the court an opportunity to exercise its new discretion under the amended statutes. On remand, "the trial court 'should conduct a hearing in the presence of defendant, [her] counsel, and the People to determine whether to" strike the five-year enhancement. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 35; *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1255 [at remand hearing, defendant has the right to the assistance of counsel and the right to be present].) If it decides to strike the enhancement, "the court should proceed to resentence defendant. If the court decides not to [strike the enhancement], the court should remand defendant to the custody of the Department of Corrections to serve the remainder of [her] term." (*Buckhalter*, at p. 35, italics omitted.)

## DISPOSITION

The sentence is vacated and the matter is remanded for resentencing consistent with the views expressed in this opinion. In all other respects, we affirm.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.